



*Commonwealth of Massachusetts
Alcoholic Beverages Control Commission
95 Fourth Street, Suite 3
Chelsea, Massachusetts 02150*

Jean M. Lorizio, Esq.
Chair

DECISION

**CAMDEN SST, INC. D/B/A SOUTH SIDE TAVERN
941 WASHINGTON STREET
BRAINTREE, MA 02184
LICENSE#: 0130-00038
HEARD: 6/27/2019**

This is an appeal of the action of the Licensing Board of the Town of Braintree (the "Local Board" or "Braintree") in suspending the M.G.L. c. 138, § 12 all alcoholic beverages license of Camden SST, Inc. d/b/a South Side Tavern ("Licensee" or "South Side Tavern") located at 941 Washington Street, Braintree, Massachusetts, for one (1) day. The Licensee timely appealed the Local Board's decision to the Alcoholic Beverages Control Commission (the "Commission" or "ABCC"), and a hearing was held on Thursday, June 27, 2019.

At the close of the June 27th hearing, the Commission left the record open for the Town of Braintree to submit a response to the Licensee's Memorandum of Law. The Local Board submitted its Opposition in a timely manner. The record is now closed.

The following documents are in evidence as exhibits:

1. Local Board's Notice of Hearing, 1/30/2019;
2. Local Board's Decision, 3/25/2019;
3. Local Board's Policies and Regulations Governing Liquor Licenses;
4. Braintree Police Department's Incident Report, 12/16/2018;
5. Joint Pre-Hearing Memorandum;
6. Licensee's Memorandum of Law; and
7. Braintree's Opposition to Licensee's Memorandum.

There is one audio recording of this hearing and three (3) witnesses testified.

FINDINGS OF FACT

The Commission makes the following findings based on the evidence presented at the hearing:

1. Camden SST, Inc. d/b/a South Side Tavern ("Licensee" or "South Side Tavern"), holds an all alcoholic beverages license and has operated a restaurant at 941 Washington Street, Braintree, MA since 2012. (Exhibit 5)

2. On December 16, 2018, Braintree Police Officer Christopher Pond was dispatched to the Hollis School in response to a call regarding an intoxicated male, Aaron (the "patron"). Officer Pond encountered the patron and two of his friends. The two friends reported that they had met Aaron earlier in the night at South Side Tavern and stated that Aaron was already intoxicated when they arrived. (Testimony, Exhibit 4)
3. Braintree Police Officer Brendan McLaughlin was assigned the follow-up investigation regarding the incident of December 16, 2018. (Testimony, Exhibit 4)
4. Officer McLaughlin contacted Matthew Kielty, manager of record, and informed him of Officer Pond's report and inquired as to any bar bills attributable to the three men referenced in said report. (Testimony, Exhibit 4)
5. Mr. Kielty was working on December 16, 2018 but did not recall the three male patrons. (Testimony)
6. The three males paid for their drinks with cash. As such, Mr. Kielty was unable to locate any receipts that were definitively theirs. (Testimony, Exhibit 4)
7. Officer McLaughlin spoke by way of telephone with Aaron who informed him that while at the licensed premise he consumed three (3) "big Bud Light drafts" which he believed each contained twenty-two (22) ounces. Aaron informed Officer McLaughlin that he had also consumed "a few shots" before he went to South Side Tavern. He stated to Officer McLaughlin that he was intoxicated on the night in question but said he had not been overserved. (Testimony, Exhibit 4)
8. Officer McLaughlin also interviewed one of Aaron's friends, Jacob (the "friend"), who informed him that Aaron had been drinking that night prior to going to the licensed premise. He stated that Aaron reported having consumed $\frac{3}{4}$ of a pint of vodka. Jacob stated to Officer McLaughlin that he had three (3) "big Coors Light draft beers" while at the licensed premises and some shots. He stated that Aaron had consumed the same. (Testimony, Exhibit 4)
9. Jacob informed Officer McLaughlin that their group was asked to leave the licensed premise after Aaron was observed by an employee, described as the bouncer, to be unsteady on his feet and swaying side to side. (Testimony, Exhibit 4)
10. Officer McLaughlin spoke with one of the bartenders working on December 16, 2018 and she had no recollection of Aaron and his friends. She stated that "everyone drinks Coors Light draft beers." (Testimony, Exhibit 4)
11. Officer McLaughlin spoke with a server working on December 16, 2018. She recalled the three men and stated that one of them is a regular customer. She informed Officer McLaughlin that she served two (2) of the men two (2) Coors Light draft beers and the third man three (3) Coors Light Draft beers. She stated that they also asked for shots and she refused to serve shots to them. She said she had observed them when they initially came into the premises and they were not exhibiting any signs of intoxication. (Testimony, Exhibit 4)
12. Officer McLaughlin spoke with Derek, the doorman on duty that night, who remembered Aaron and his friends. He stated that he noticed one of the men appeared to be "wobbly" as

he walked. Derek waited for the patron to sit down and then approached to tell the patron he would not be served any more alcohol. Derek said the patron and his friends were ready to leave and took an Uber when they left. Officer McLaughlin asked Derek if he was aware of what the three men had to drink at the licensed premise and he stated, "I have no idea." (Testimony, Exhibit 4)

13. On January 30, 2019, the Local Board notified South Side Tavern that it would hold a hearing regarding an alleged violation of M.G.L. c. 138, § 69, service of alcoholic beverages to an intoxicated person, which occurred on December 16, 2018.
14. A hearing was held before the Local Board on March 12, 2019. The Local Board found the Licensee in violation of M.G.L. c. 138, § 69, service of alcoholic beverages to an intoxicated person.
15. By decision dated March 25, 2019, the Local Board imposed a penalty of a one (1) day suspension.
16. The Licensee timely appealed the Local Board's decision to the ABCC.

DISCUSSION

Pursuant to M.G.L. Ch. 138, § 67, "[t]he ABCC is required to offer a de novo hearing, that is to hear evidence and find the facts afresh. As a general rule the concept of a hearing de novo precludes giving evidentiary weight to the findings of the tribunal from whose decision an appeal was claimed." Dolphino Corp. v. Alcoholic Beverages Control Comm'n, 29 Mass. App. Ct. 954, 955 (1990) (citing United Food Corp. V. Alcoholic Beverages Control Comm'n, 375 Mass. 240 (1978); Devine v. Zoning Bd. of Appeal of Lynn, 332 Mass. 319, 321 (1955); Josephs v. Bd. of Appeals of Brookline, 362 Mass. 290, 295 (1972)). The findings of a local licensing board are "viewed as hearsay evidence, [and] they are second-level, or totem pole hearsay, analogous to the non-eyewitness police reports in Merisme v. Board of Appeals on Motor Vehicle Liab. Policies and Bonds, 27 Mass. App. Ct. 470, 473-476 (1989)." Id.

Licenses to sell alcoholic beverages are a special privilege subject to public regulation and control, Connolly v. Alcoholic Beverages Control Comm'n, 334 Mass. 613, 619 (1956), for which States have especially wide latitude pursuant to the Twenty-First Amendment to the United States Constitution. Opinion of the Justices, 368 Mass. 857, 861 (1975).

Chapter 138 was "enacted . . . to serve the public need and . . . to protect the common good." M.G.L. c. 138, § 23. In order to effectuate the purpose of Chapter 138, the Commission has "general supervision of the conduct of the business of manufacturing, importing, exporting, storing, transporting and selling alcoholic beverages. . . ." M.G.L. c. 10, § 71. As part of these "comprehensive powers of supervision over licensees," Connolly, 334 Mass. at 617, the Commission has the authority to grant, revoke and suspend licenses. "[T]he purpose of discipline is not retribution, but the protection of the public." Arthurs v. Bd. of Registration in Medicine, 383 Mass. 299, 317 (1981).

The Licensee is charged with service to an intoxicated person in violation of M.G.L. c. 138, § 69. "No alcoholic beverages shall be sold or delivered on any premises licensed under this chapter to an intoxicated person." M.G.L. c. 138, § 69. "[A] tavern keeper does not owe a duty to refuse to

serve liquor to an intoxicated person unless the tavern keeper knows or reasonably should have known that the patron is intoxicated.” Vickowski v. Polish Am. Citizens Club of Deerfield, Inc., 422 Mass. 606, 609 (1996) (quoting Cimino v. Milford Keg, Inc., 385 Mass. 323, 327 (1982)). “The negligence lies in serving alcohol to a person who already is showing discernible signs of intoxication.” Id. at 610; see McGuiggan v. New England Tel. & Tel. Co., 398 Mass. 152, 161 (1986).

The law is well-settled that “the responsibility of the licensee is to exercise sufficiently close supervision so that there is compliance with the law on the premises. A vendor who sells alcohol is “bound at his own peril to keep within the condition of his license.” Rico’s of the Berkshires, Inc. v. Alcoholic Beverages Control Comm’n, 19 Mass. App. Ct. 1026, 1027 (1985) (quoting Commonwealth v. Gould, 158 Mass. 499, 507 (1893), and citing Burlington Package Liquors, Inc. v. Alcoholic Beverages Control Comm’n, 7 Mass. App. Ct. 186, 190 (1979); accord Commonwealth v. Gould, 158 Mass. 499, 507 (1893). “It is, thus, quite possible for a Licensee to offend the regulatory scheme without scienter.” Rico’s of the Berkshires, 19 Mass. App. Ct. at 1027.

In order for the Commission to make a finding, there must be substantial evidence that a violation has occurred. “Substantial evidence of a violation is more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” Consol. Edison Co. of New York v. N.L.R.B., 305 U.S. 197, 229 (1938); accord Charlesbank Rest. Inc. v. Alcoholic Beverages Control Comm’n, 12 Mass. App. Ct. 879 (1981).

The Local Board has the burden of producing satisfactory proof that the Licensee committed the violation that occurred on December 16, 2018.

In order to substantiate a violation of M.G.L. c. 138, s. 69, there must be proof of the following: 1) an individual was on the licensed premises; (2) that an employee of the licensed premises knew or reasonably should have known that the individual was intoxicated; and (3) that after the employee knew or reasonably should have known the individual was intoxicated, the employee sold or delivered an alcoholic beverage to the intoxicated individual. Vickowski, 422 Mass. at 609.

In this matter, the Local Board produced evidence of Aaron being inside the licensed premises and being served alcohol. However, there was no evidence presented to the Commission as to the Licensee observing obvious signs of intoxication prior to Aaron’s being served alcohol. To the contrary, the evidence establishes that once Aaron was seen to be unsteady on his feet, an employee of the Licensee approached him and informed him that he would not be served any more alcohol. (Exhibit 4)

The Braintree Police Officers who testified before the Commission were found to be both professional and credible. However, neither Officer was inside the licensed premise on the night of the incident. (Testimony, Exhibit 4) Neither Officer witnessed the patron being served alcohol.

Officer McLaughlin conducted the follow-up investigation into this matter and only spoke with Aaron over the telephone sometime after the incident. Braintree Chief of Police Paul Shastany is a member of the Board of License Commissioners. As such, he was not involved in the investigation, but testified before the Commission as to the Board of License Commissioner’s

determination to issue a suspension in this matter. (Testimony, Exhibit 4) As a result, the Officers had no firsthand knowledge of any of the elements necessary to support a finding of a violation of M.G.L. c. 138, s. 69.

The Commission is persuaded and finds that the Local Board has not proved by legally competent evidence that the Licensee violated M.G.L. c. 138, § 69.

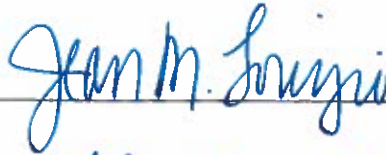
CONCLUSION

The Alcoholic Beverages Control Commission ("Commission") **DISAPPROVES** the action of the Licensing Board of the Town of Braintree in finding that Camden SST, Inc. d/b/a South Side Tavern, committed a violation of M.G.L. c. 138, § 69.

The Commission **DISAPPROVES** the action of the Town of Braintree in imposing a penalty of a one (1) day suspension. As such, the Commission remands the matter to the Town of Braintree Licensing Board with the recommendation that it find no violation and that no further action be taken against the Licensee, as any penalty would be discrepant with this Decision.

ALCOHOLIC BEVERAGES CONTROL COMMISSION

Jean M. Lorizio, Chairman



Kathleen McNally, Commissioner



Dated: November 6, 2019

You have the right to appeal this decision to the Superior Courts under the provisions of Chapter 30A of the Massachusetts General Laws within thirty (30) days of receipt of this decision.

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cc: Louis A. Cassis, Esq.
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